No. 82-1213

Office Supreme Court, U.S.
FILED
JUL 28 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK,

Petitioner,

against

BENJAMIN QUARLES,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

JOINT APPENDIX

JOHN J. SANTUCCI
District Attorney, Queens County
Attorney for Petitioner
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(212) 520-5546

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Petition for Certiorari Filed January 17, 1983
Certiorari Granted May 23, 1983

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LIST OF RELEVANT ENTRIES WITH DATES

September 11, 1980: Criminal Court Complaint Lodged

November 24, 1980: Indictment Filed

February 17, 1981: Defendant's Notice of Motion Seeking Suppression, Affidavit of Steven J. Hyman In Support of Defendant's Motion to Suppress, and Affirmation of James Kehoe Answering Defendant's Motion Filed

March 6, 1981: Order and Memorandum of Hon. Sol R. Dunkin Entered and Hearing on Motion to Suppress Held

April 3, 1981: Order and Memorandum Decision of Hon. Nicholas Ferraro Granting Suppression Entered

April 29, 1981: Notice of Appeal and Statement of Insufficiency of Proof in Absence of Reversal Filed

December 7, 1981: Order of Appellate Division Affirming Order Appealed From and Statement of No Opinion Entered

February 11, 1982: Order Granting Leave to Appeal to the Court of Appeals of the State of New York Entered

November 18, 1982: Memorandum Opinion of the Court of Appeals, State of New York Entered

Criminal Court Complaint

CRIMINAL COURT OF THE CITY OF NEW YORK
Part AR 1 County Queens

THE PEOPLE OF THE STATE OF NEW YORK

vs.

BENJAMIN QUARLES,

Defendants.

State of New York)
County of Queens) ss:

PO Kraft Sh#10473 of 111 Precinct being duly sworn, deposes and say that on 9/11/80 at about 12:30 AM at 46-20 Francis Lewis Blvd. (A and P) Queens, State of New York, the defendant committed the offenses of:

A. PL 265.03—Possession of a loaded gun (Armed Felony Offense)

in that said defendants Benjamin Quarles under the following circumstances: Deponent states that at the above time and location, in the County of Queens, the defendant did knowingly and unlawfully possess a loaded gun, in that the deponent was informed by one, Gertha Mosely, that the defendant did have a loaded gun in his possession and upon investigation by the deponent the defendant did in fact have in his possession a loaded gun; to wit .38 caliber revolver (RG40), loaded with six (6) live rounds, serial #RO88942, and the defendant did make the admission to the deponent that he had thrown the said gun into a carton, and the said gun was recovered by the deponent inside the said carton.

9-11-80 /s/ PO FRANK KRAFT
Deponent

Indictment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS

Indictment No. 2312/1980

THE PEOPLE OF THE STATE OF NEW YORK,

against

B. BENJAMIN QUARLES—AFO.VFO

Defendant.

INDICTMENT

COUNTS

CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DECREE

A TRUE BILL

FOREMAN

JOHN SANTUCCI
District Attorney

Indictment

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF QUEENS, BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE COMMITTED AS FOLLOWS:

THE DEFENDANT ON OR ABOUT SEPTEMBER 11, 1980, IN THE COUNTY OF QUEENS, KNOWINGLY AND UNLAWFULLY POSSESSED A LOADED FIREARM, TO WIT: A LOADED .38 CALIBER REVOLVER, SUCH POSSESSION NOT BEING IN THE DEFENDANT'S HOME OF PLACE OF BUSINESS.

THE SUBJECT MATTER OF THIS COUNT BEING AN ARMED FELONY AS THAT TERM IS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW.

JOHN SANTUCCI
District Attorney

Defendant's Notice of Motion Seeking Suppression

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS

Indictment # 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

against

BENJAMIN QUARLES,
Defendant.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the indictment herein and the affidavit of Steven J. Hyman, sworn to the 27th day of January, 1980, the defendant, by his attorneys, Hyman & Miner, will move this court at a Criminal Term, Part 7, Supreme Court, County of Queens, located at the General Courthouse, 88-11 Sutphin Boulevard, Jamaica, N.Y. on the 17th day of February, 1981, at 9:30 a.m. in the forenoon or as soon thereafter as counsel can be heard, for the following relief:

1. For an order pursuant to Article 240.40 of the Criminal Procedure Law granting defendant the complete sub-

stance of the statement alleged to have been made by him to police officer Kraft on September 19, 1980; and

2. For an order pursuant to Section 710.20 of the Criminal Procedure Law suppressing the alleged admission made by defendant to a public servant on September 19, 1980, admitting to possession of a weapon, on the grounds that such admission was involuntary and made in contravention of defendant's constitutional rights; and

3. For an order pursuant to Section 710.20 of the Criminal Procedure Law suppressing the seizure of the weapon which is the subject matter of the indictment herein, on the grounds that such weapon was seized as a result of unlawful and involuntary alleged admissions made by the defendant and was otherwise obtained in contravention of defendant's right under the Fourth and Fifth Amendments of the Constitution of the United States.

4. And for such other and further relief as this court may deem just in the premises.

Dated: January 1981

Yours, etc.,

HYMAN & MINER
Attorneys for defendant
148 East 78th Street
New York, N.Y. 10021
212/737-0400

To: QUEENS COUNTY DISTRICT ATTORNEY
125-01 Queens Boulevard
Kew Gardens, N.Y. 11415

Affidavit of Steven J. Hyman In Support of Defendant's Motion to Suppress

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS

Indictment # 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

against

BENJAMIN QUARLES,
Defendant.

AFFIDAVIT

State of New York)
County of New York) ss.:

STEVEN J. HYMAN, being duly sworn, deposes and says:

1. I am a member of the firm of Hyman & Miner, attorneys for the defendant herein, and submit this affidavit in support of defendant's motion for certain relief pursuant to Section 240.40 of the Criminal Procedure Law and for suppression of certain evidence pursuant to Article 710 of the Criminal Procedure Law.

2. Defendant was indicted in or about December 30, 1980 on a one count indictment charging defendant with

criminal possession of a weapon in the third degree. The indictment is annexed hereto as Exhibit "A".

3. The District Attorney has, pursuant to CPL Section 710.30 served upon defendant, notice that intends to offer a trial a statement to the effect that "the defendant admitted to possession of the gun" which statement was alleged to have been made to a police officer (said notice is annexed hereto as Exhibit "B"). It is submitted that this statement is insufficient for defendant to fully understand the full substance of the alleged admission made by him and it is therefore requested that the District Attorney be required to furnish a more detailed statement of the alleged admission made by defendant.

4. Defendant further moves for a hearing to suppress the weapon and the alleged admission made by defendant in that it is submitted that such evidence was illegally seized in violation of the defendant's constitutional rights.

5. At a preliminary hearing, the police officer herein testified that after placing defendant under arrest and having a weapon pointed at defendant's head, he requested of defendant where the weapon was which is the subject matter of this indictment. At no time, it appears, did the police officer advise defendant of his constitutional rights but instead proceeded to extract admissions from the defendant which are now being used against him. In addition, it appears that this alleged statement made by defendant resulted in the officer seizing the weapon which is the subject matter of the indictment and seeking to place ownership

thereof with the defendant. The seizure of such evidence was, therefore, in violation of defendant's constitutional rights to the extent that it came as a result of an illegally obtained admission.

6. It is therefore submitted that this matter should be set down for a hearing to determine whether or not the admission made by defendant was voluntary and whether the weapon seized thereby was properly obtained under the Constitution of the United States.

WHEREFORE, it is respectfully requested that defendant's motion be, in all respects, granted.

/s/ STEVEN J. HYMAN

STEVEN J. HYMAN

Sworn to before me this
27 day of January, 1981

MARTIN P. MINER
NOTARY PUBLIC, State of New York
No. 30-451-4918
Qualified in Nassau County
Commission Expires March 30, 1981

Affirmation of James Kehoe
Answering Defendant's Motion

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM: QUEENS COUNTY

IND. # 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENJAMIN QUARLES,

Defendant.

State of New York)
County of New York) ss.:

I, James Kehoe, an Assistant District Attorney of Queens County, of counsel to JOHN J. SANTUCCI, DISTRICT ATTORNEY OF QUEENS COUNTY, do hereby affirm the statements herein to be true under the penalties of perjury, except such as are made upon information and belief, which matter I believe to be true.

1. Substance of defense statement is admitting possessing weapon and told arresting officer where it was.

2, 3. Opposed. The motion is base upon the existence on occurrence of facts, and the moving papers do not contain sworn allegation supporting all the essential facts.

4. Acknowledge.

Dated: February 13, 1981
Jamaica, NY

/s/ JAMES KEHOE

Assistant District Attorney

Order and Memorandum of Hon. Sol R. Dunkin

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM, PART 7, QUEENS COUNTY

88-11 Sutphin Boulevard, Jamaica, New York

Present: HONORABLE SOL R. DUNKIN, Justice.

Ind. No. 2512/80

Motion Omnibus

Submitted February 17, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENJAMIN QUARLES,

Defendant.

The following papers numbered 1 to 4 submitted on this motion.

Steven J. Hyman, Esq.
For the Motion

James Kehoe, Esq., A.D.A.
Opposed

	Papers Numbered
Notice of Motion and Affidavits Annexed	1–2
Answering and Reply Affidavits	3
Exhibits	
Minutes—Other	4

Order and Memorandum of Hon. Sol R. Dunkin

Upon the foregoing papers and in the opinion of the Court, defendant's motion is granted in part and denied in part. See accompanying memorandum dated March 6, 1981.

GRANTED:

Date: March 6, 1981

SOL R. DUNKIN, J.S.C.

Order and Memorandum of Hon. Sol R. Dunkin

MEMORANDUM

SUPREME COURT, QUEENS COUNTY

CRIMINAL TERM, PART 7

BY SOL R. DUNKIN, J.

DATED March 6, 1981

Ind. No. 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENJAMIN QUARLES,

Defendant.

The defendant makes this omnibus motion for the following relief:

1. For an order directing the District Attorney to disclose the substance of a statement allegedly made by the defendant.

2. For an order suppressing statements allegedly made by the defendant.

3. For an order suppressing physical evidence.

Order and Memorandum of Hon. Sol R. Dunkin

The first branch of the defendant's motion is granted to the extent of the response in the District Attorney's answering affirmation.

The second and third branches of the defendant's motion are granted to the extent that pre-trial *Huntley* and *Mapp* hearings are ordered.

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of this decision to the attorney for the defendant and to the District Attorney.

SOL R. DUNKIN, J.S.C.

Hearing on Motion to Suppress

SUPREME COURT: QUEENS COUNTY

TRIAL TERM, PART 9

Indictment 2512-80

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENJAMIN QUARLES,

Defendant.

General Courthouse
88-11 Sutphin Boulevard
Jamaica, New York 11435
March 6, 1981

HEARING

Before:

THE HONORABLE NICHOLAS FERRARO, *Justice.*

APPEARANCES:

FOR THE PEOPLE:

JOHN J. SANTUCCI, ESQ.
Queens District Attorney
BY: JOHN WALLENSTEIN, ESQ.
Assistant District Attorney

FOR THE DEFENDANT:

STEVEN HYMAN, ESQ.

GLORIA SEELEY
Official Court Reporter

Hearing on Motion to Suppress

The Clerk: Added to the Part 9 calendar, indictment 2512-80, Benjamin Quarles. Are you Benjamin Quarles?

Defendant: Yes, I am.

Mr. Hyman: Steven Hyman of the firm of Hyman and Myer, Manhattan.

The Clerk: Mr. Quarles is Mr. Steven Hyman here your attorney?

Defendant: Yes.

The Clerk: This case was transferred from Judge Dunkin's part forthwith for Mapp and Huntley Hearing.

The Court: Call your witness Mr. Wallenstein.

Mr. Hyman: May I have my associate sit with me?

The Court: Yes. Would you call the police officer, please.

Police Officer FRANK KRAFT, Shield 10473, New York City Police Department, 111th Precinct, called as a witness by and on behalf of the People, being duly sworn, testified as follows:

The Court: Mr. Wallenstein.

Direct Examination by Mr. Wallenstein:

Q. Officer Kraft, I direct your attention to September 11, 1980 in the vicinity of 46-20 Francis Lewis Boulevard in Queens County. Were you present and on duty at that location at that time?

A. I was, sir.

Q. And, did you have occasion at that time to arrest the defendant, Benjamin Quarles?

A. I did, sir.

Q. Would you tell us the events leading up to that arrest?

A. On the day in question I was the operator of the department vehicle, and we were eastbound on 47th Avenue at Francis Lewis Boulevard when a young lady came running down the street and asked my assistance, that she had been raped.

Mr. Hyman: Objection.
The Court: It's a hearing, counselor.
Mr. Hyman: Excuse me.
The Court: It's a hearing.
Mr. Hyman: Yes, I understand that, Judge.
The Court: I'll permit it.

Q. What did she say to you?

A. She told me that there was a man in the A&P that had a gun, that had taken her in an automobile to that location.

Q. And, did she give you a description of that man?

A. She did.

Q. What description did she give?

A. She told me there was a man in the A&P, male black, approximately 6 feet and he was wearing a short black jacket and in the back of the jacket was marked "Big Ben" in yellow letters.

Q. And—

The Court: Big Ben?
The Witness: Big Ben.

Q. And, what did you do at that time?

A. I proceeded to the front of the store and I observed the inside of the store. I observed the defendant coming —walking between the aisles to the check-out counter.

Q. And, would you give us a description of the person you saw at that time?

A. The perpetrator, a male black.

Q. What did he look like?

A. Male black, six foot, walking to the check-out counter with a few groceries in his hands, and he had the jacket on, and on the jacket was marked "Big Ben."

Q. What did you do at that time?

A. At that time, we waited. We thought maybe the perpetrator would come out of the store. When the perpetrator observed me standing in the doorway he ran from the checkout counter between the aisles to the rear of the store.

Q. What did you do?

A. I gave chase.

Q. What happened next?

A. When I reached the end of the aisle, I told the defendant to stop, placed his hands above his head, which he did, and I approached the defendant, and I frisked him.

Q. What did you find when you frisked him?

A. Under his jacket he was wearing a brown leather shoulder holster which was empty.

Q. What happened then?

A. And, I asked the defendant where the gun was.

Q. What did he say?

A. He pointed and told me it was in the carton to his right, approximately four feet from where he was standing.

Q. What kind of a carton was that?

A. Cartons piled on the floor, approximately—maybe six feet high of cartons containing liquid soap.

Q. Did you look in that carton?

A. I did.

Q. What did you find?

A. A loaded revolver.

The Court: What kind of a revolver?

The Wtiness: Thirty-eight.

Q. What did you do at that time?

A. I then placed the defendant under arrest and we took him into the station house.

Q. Now, at the scene, did you ask him any further questions?

A. After I advised him of his rights, I did.

Q. What rights did you advise him of, Officer?

A. He had the right to remain silent, and so on and so forth.

The Court: Not so on and so forth, what did you say to him, and—what did you say to him?

Mr. Hyman: Excuse me, your Honor, I did not hear the first question. The question—

The Court: (Int'g) Please read it back.

Mr. Hyman: As to—prior to when he gave the rights, that last statement.

(Whereupon, the reporter read the requested testimony.)

Q. Officer, when you advised him of his rights, did you read them from something?

A. I did, sir.

Q. What did you read them from?

A. I carry this calendar in my leather jacket at all times on the back of it, is the rights.

Q. This piece of paper?

A. Yes, sir.

Mr. Wallenstein: May I have this deemed marked?

The Court: Show it to co-counsel.

Mr. Wallenstein: People's I for identification at this time.

(Whereupon, the item referred to is received and deemed People's I for identification)

Q. Officer, this piece of paper which I have in my hands, which is deemed marked People's Exhibit I for identification, is this the paper that you read from at that time?

A. The exact one, sir.

Q. The exact one? And, did you read this verbatim?

A. Yes, sir.

Mr. Wallenstein: Your Honor I offer it in evidence.

The Court: Deemed marked in evidence as People's I.

(Whereupon, the item referred to previously deemed People's I for identification is received and (deemed) People's I in evidence:)

Q. Now, Officer, using People's I, Officer, we're going to hold that for a few minutes. There are questions on that piece of paper. Did he respond to each of those questions?

A. He did, sir.

Q. Would you read us the way you did at that time, would you read us the question you asked him and tell us what his response was?

A. The light is not too good here. So, I would need my glasses to read this.

Q. Do you have them?

A. I do.

The Witness: Can I get my glasses, your Honor?
The Court: Surely.
The Witness: Want me to continue?
Mr. Wallenstein: Yes, sir.

A. (Cont'g) "You have the right to remain silent and refuse to answer any questions; do you understand?" He replied that he did. "Anything that you say may be used against you in a court of law; do you understand?" And, he shook his head on that one.

Q. Yes or no?

A. Yes. "You have the right to counsel and attorney before speaking to the police and have—" the light is very poor here, "and have an attorney present during the questions and in the future, do you understand?" And, he said he did. "If you cannot afford an attorney one will be supplied to you without cost; do you understand?" Just looked at me. No answer on that one.

Q. Okay.

A. "If you do have an attorney available, you have the right to remain silent until you have one—an opportunity to consult with one; do you understand?" No answer, no remarks whatsoever. "Now that you have been advised of

your rights, are you willing to answer any questions without an attorney present?''

Q. What did he say?

A. He said, yes.

Q. Now, after you advised him of his rights, what did he say to you and —what did he say to you?

A. I asked him did he own the gun.

Q. What did he say?

A. He did.

Q. What?

The Court: What did he say?
The Witness: He did.
The Court: He said he did.
The Witness: He said he owned the gun.
The Court: What was his words?

Q. What were his exact words?

A. I said to him, do you own a gun, and he said he did.

Q. You say he did or did he say I—

A. He did, that I can recall. He did.

Q. Did you ask him anything else?

A. I asked him where he bought it.

Q. What did he say?

A. Miami, Florida.

Q. Did you have any further conversation with him at that time?

A. No, sir.

Q. You then took him back to the 111th Precinct; is that correct.

A. Yes, sir.

Q. At the precinct did you have any conversation with him?

A. No, sir.

Q. You took his pedigree for the arrest report; is that right?

A. At Central Booking.

Q. In addition to his pedigree, did he make any other statements to you?

A. No, sir.

Q. Now, Officer, the individual who you've described as the perpetrator, the person with the gun that you arrested that day, do you see him in this courtroom?

A. Yes, sir.

Q. Could you point him out, please?

A. Yes, sir. He's there, right there with the grey.

Mr. Hyman: Pointing to the defendant, your Honor.

The Court: Indicating the defendant, thank you.

Mr. Wallenstein: Your Honor, I would ask that the gun be deemed marked in evidence for the purpose of the hearing.

Mr. Hyman: No objection, your Honor.

The Court: Fine, deemed marked People's II in evidence.

(Whereupon, the item referred to is received and deemed People's II in evidence.)

Cross Examination by Mr. Hyman:

Q. Officer Kraft, how long had you been on duty that night in question, sir?

A. Approximately 45 minutes, sir.

Q. And, who—were you alone in your patrol car, sir?

A. No, sir.

Q. Was there another officer with you?

A. Yes, sir.

Q. What was that officer's name?

A. The officer is Police Officer Sal Scarring. [phon]

Q. And, is Police Officer Sal Scarring on the force today?

A. No, sir.

Q. Do you know where he's located?

A. Somewhere in Florida.

Q. Now, you say you were approached by a woman; is that correct?

A. That's true.

Q. Had you ever seen this woman before?

A. No, sir.

Q. And, she indicated to you that the defendant was in the store and had a gun; is that what she said?

A. She told me, yes, sir.

Q. And, what did you then do after speaking with the —this woman? What did you next do?

A. The exact movement you want, sir?

Q. Well, as best you can recall, Officer. After you had a conversation with this woman, I presume at the patrol car; is that correct?

A. That's right. I placed her inside of the patrol car and proceeded to the front of the store, which is approximately—

Q. Put her in the police car?

A. Right. And, I proceeded to go to the front of the A&P which is approximately a quarter way up the block, north of where I was stopped.

Q. Now, is this a shopping center, sir?

A. No, it's just a large A&P with a parking area in the front of it.

Q. And, what did you then do?

A. Next? After she gave me a description of the perpetrator, I left the R.M.P. and stood in front of the doorway of the store.

Q. Now, she gave you—did you write down the description?

A. No, sir.

Q. And, you're saying she gave you a description of a black man who was 6 foot, who had a jacket on; is that it?

A. Yes, sir.

Q. And, where was your car parked in relation to the front of the store?

A. Approximately two car lengths from—approximately about 40 feet from the entrance of the store.

Q. And, you then left your vehicle?

A. Yes, sir.

Q. At that time, had you called in at all with respect to this event?

A. I did, my partner did, sir.

Q. Had you asked for any assistance at that time?

A. My partner had informed C.U. that we were at this location and that we were looking for a perpetrator with a gun.

Q. Does that mean, sir, that other patrol cars will be responding?

A. Yes.

Q. Did, in fact, other patrol cars respond?

A. Yes, sir.

Q. By the time you entered the store, how many other patrol cars were there?

A. I have no idea, sir.

Q. Was there more than one?

A. Yes, sir.

Q. So far as you understood, by the time you went to the store, there were at least four police officers in the vicinity, possibly more—that is, in the vicinity of the store?

A. I would say so, yes, sir.

Q. And, you then are standing—prior to entering the store, you say you stand in front of the door, is that it, sir?

A. I was standing at the doorway of the store.

Q. And, what do you observe?

A. Looking into the store at the moment that I came to the front door, all I could observe was a clerk who was at one of the check-out counters approximately 35. 40 feet from where I was standing.

Q. Were there any other people that you observed at that time?

A. No, sir.

Q. And, then what transpired?

A. Then, I observed the defendant walking, coming between the aisles to the check-out counter.

Q. Now, how many aisles, if you recall, sir, were there in this supermarket that you could observe?

A. I don't understand your question.

Q. How many numbers?

A. It was quite a few, sir.

Q. Was he coming out of a middle aisle, an end or—

A. Approximately seven check-outs from where I was standing.

Q. And, what did you observe him do next?

A. He came to the check-out counter, he placed a few groceries on the counter and—

Q. (Int'g) Was he facing you at this time?

A. Yes, sir.

Q. And, when he came out of the aisle, was he facing you?

A. No, sir.

Q. Was he walking backward?

A. No—he would come out of the aisle, he was facing east and I was standing North—that the doorway to the store is on the northside of the store.

Q. So, when you first seen him, how was he in relation to you? Are you seeing his front, his back, his side, what are you seeing?

A. I'm seeing his side, and his front, from the angle where I was standing.

Q. All right. I'm trying to visualize east and north, Officer. I'm having a tough time of it.

Mr. Hyman: Your Honor, may I have one moment?

The Court: Yes.

What did you give him?

Mr. Wallenstein: I gave him the Grand Jury minutes.

Mr. Hyman: Rosario.

Thank you, your Honor.

Q. Mr. Kraft, you observed the front and you say side of the individual. Was he then walking away from you when you first see Mr. Quarles?

A. He's not—he's walking toward me.

Q. And, when he approached the counter, he put down the groceries?

A. Yes, sir.

Q. Is he also walking toward you at that time, that is, is he facing you?

A. Oh, yes.

Q. So, you're looking directly at the check-out counter at that point?

A. I'm looking directly in the perpetrator's face.

Q. At any time between the time you first saw him and the time you observed him at the check-out counter, had he turned around, turned his back to you?

A. I can't recall.

Q. Now, when you see him after he's at the check-out counter, how long by the way has this now taken from the time you got to the A&P to the time you've seen him, Mr. Quarles, as you say, at the check-out counter with the groceries, time-wise, sir?

A. From the time that the female informant came up to me?

Q. Or the time you were at the A&P, whatever is easier for you.

A. Approximately five minutes.

The Court: From when to when?

The witness: From the time that the informant told me that the perpetrator had a gun.

Q. How long if you can tell me, Officer Kraft, do you think you were outside the store before you went inside the

store—that is had arrived at the store and watching for an individual, saw Mr. Quarles and then went into the store?

A. I don't think—less than two minutes or so.

Q. And, what happens now when you see Mr. Quarles at the check-out counter? You say something else transpired with regard to Mr. Quarles? What does he do?

A. He turns around and runs up the aisle away from the check-out counter.

The Court: Toward the rear of the store?
The Witness: Toward the rear of the store.

Q. Does he say anything to you?

A. No, sir.

Q. Now, what then do you do, sir?

A. I ran right after the defendant up the same aisle that he had proceeded to the rear of the store.

Q. And, do you have your weapon at this point?

A. Pardon me, sir?

Q. Do you have your weapon at the point that you enter the store?

A. Yes, sir.

Q. And, at the time you're running up the aisles, do you have your weapon?

A. Yes, sir.

Q. And, do you have your weapon drawn?

A. Yes, sir.

Q. And, is your partner with you?

A. Do you mean in the same aisle?

Q. In the store, let's say.

A. He's in the store, yes, sir.

Q. Do you know if any other officers are in the store at that point?

A. There are.

Q. Do you know how many?

A. No, sir.

Q. Now, your partner runs up an aisle as well; is that it? Another aisle?

A. Yes, sir.

Q. Do you see him again before you see Mr. Quarles?

A. No, sir.

Q. When you see Mr. Quarles, is your partner, does your partner come on the scene rather quickly?

A. Rather quickly, yes.

Q. And, do the other police officers come on the scene rather quickly?

A. Rather quickly.

Q. Now, you follow Mr. Quarles, you say, up the aisle?

A. Yes, sir.

Q. What then happens?

A. When Mr. Quarles reaches the end of the aisle, he makes a right turn, which I lose sight of him for approximately, whatever, and I make a turn and there is—two aisles away, there is Mr. Quarles standing there.

Q. So, he's standing now in an aisle, and you see him in the aisle. Is he still running?

A. No, he's slowing down, let's put it that way—stopped.

Q. Slowing to a stop, and when you see him slow to a stop, he's in the aisle?

A. Right.

Q. And, you have him in complete visual contact at that point?

A. Yes, sir.

Q. How long do you think you lose sight of him for? Time-wise?

A. Fifteen seconds, 20 seconds.

Q. To turn a corner 15, 20 seconds? You're running after him?

A. Right.

Q. He makes a turn, how far are you from him when you're running up the aisle?

The Court: How far from him are you when you lose sight of him, is that what you mean?

Mr. Hyman: First, your Honor, let's establish how far he was when you first run into the store and run after Mr. Quarles.

Q. How far are you initially and do you close the gap?

A. About ten yards or so.

The Court: Ten yards—30 feet?

The Witness: About 30 feet.

Q. And, do you, before Mr. Quarles turns the corner, close the gap?

A. Somewhat.

Q. And, you then turn the corner right after he does, right?

A. Approximately.

Q. And, when you see him again, how far away is he from you at that point?

A. Another 30 feet, approximately 30 feet away from me.

Q. Now, is this in a lighted store?

A. Yes, sir.

Q. And, you now see him at again 30 feet away or so. What do you then do when you see him turn the corner?

The Court: You mean after he turned the corner?
Mr. Hyman: Yes.
The Court: After he turned the corner.

A. After I turned the corner, when I observed the defendant, I told him to stop, put his hands over his head.

Q. And, what did the defendant do?

A. He did as such.

Q. Now, are these the first words you've spoken to the defendant?

A. Yes, sir.

Q. At that time, do other police officers come on the scene where you are?

A. Yes, sir.

Q. How many other officers now converge at that point?

A. I don't recall the number.

Q. More than three?

A. Yes, sir.

Q. Do they surround in essence, Mr. Quarles?

A. In essence, yes, sir.

Q. Do they all have their weapons drawn?

A. I can't recall that.

Q. You had your weapon drawn?

A. Yes, sir.

Q. Did your partner have his weapon drawn?

A. Yes, sir.

Q. Did you then approach Mr. Quarles?

A. I did.

Q. Were you the first one to reach Mr. Quarles, or did any of the other police officers arrive there ahead of you in direct proximity to him? If you recall.

A. My recollection is I reached the defendant before any other police officers did.

Q. Now, at the time you reached the defendant, how are his hands?

A. In the air now.

Q. And, is he facing you directly?

A. Partially.

Q. Is he facing any other police officers?

A. I can't recall that.

Q. What then do you say if anything to Mr. Quarles?

A. I moved right next to the defendant. I holstered my revolver. I moved right next to the defendant and I frisked him. I tossed him.

Q. Did you at that time say anything to him?

A. Not until after I got done with the frisk.

Q. Now, the other police officers, what were they doing at that time, if you recall?

A. Just standing there.

Q. At that point do you recall how many officers there were?

A. No, sir.

Q. Now, when you say you frisked him, what did you do, physically?

A. I was face to face with the defendant and I took my hands and I came down his clothing, his body, and when

I reached underneath his shoulder, I opened up—I could feel something. I could open his jacket up, his jacket was unzipped and I placed it apart further and I seen the strap of a shoulder holster.

Q. And, then did you continue to frisk him?

A. I went right into the shoulder holster for the gun.

Q. And, did you continue to frisk the rest of the defendant?

A. I did.

Q. At this time, as you were frisking him, the other officers were there with their weapons still drawn, were they not?

A. I don't recall that.

Q. At the point now you completed the frisk. What did you physically do with respect to the defendant? Did you move him? Did you place him against the wall? Did you handcuff him?

A. I handcuffed him in the rear.

Q. So, now his hands were behind him?

A. Yes, sir.

Q. Had you at that moment placed him under arrest?

A. Did I inform him he was under arrest at that time?

Q. Yes.

A. I can't say I had.

Q. Now, after you have him handcuffed, what next happens with respect to you and Mr. Quarles?

A. I asked the defendant where the gun was.

Q. Had you had any other conversation with him prior to that question and after you had said to him, "Halt, put your hands in the air," or "stop" or words to that effect?

A. I don't recall any conversation.

Q. How long now after you had frisked him, handcuffed him did it take—let me withdraw that question.

Let me rephrase it differently. What was the time period between the time that you approached Mr. Quarles and frisked him to the time that you handcuffed him?

A. A matter of minutes.

Q. And, at that point, sir, how long was it until you asked him any questions after you handcuffed him, do you recall?

A. Took me probably less than a minute to frisk him. When I didn't come up with the gun is when I asked him where—when I started to question him.

Q. When you say you had handcuffed him and then questioned him, had you moved him physically anywhere or was he still standing in the same spot?

A. Approximately the same spot he was stopped at.

Q. Had you turned him around in any way?

A. Yes.

Q. Now, when you asked him where the gun was were other police officers present?

A. Yes, sir.

Q. And, what did the defendant say to you at this time now?

A. He pointed to where the gun was.

Q. He has these handcuffs, so he's not pointing.

A. Excuse me. He looked in the direction where the gun was and told me it was in the carton.

Q. What were the words he said to you, if you recall?

A. The exact words?

Q. To the best of your recollection.

A. "The gun is over there."

Q. Now, at the time that he made this statement did anyone have a weapon on him that you recall? That is, did other police officers still have or—were there weapons drawn, pointed at the defendant?

A. Not that I could recall, no, sir.

Q. Is it possible or not that you—or you can't answer the question?

A. I don't believe that anybody had their gun drawn after the perpetrator was handcuffed.

Q. Because the situation was under control?

A. Definitely, sir.

Q. Now, when he says the gun is—does he identify the carton that it's in?

A. No.

Q. Now, you also indicated that he indicated he was looking at an area. When you looked at that area, did you see any weapon in sight?

A. No, sir.

Q. And, you then went over and took the weapon out of the carton; is that it?

A. A cardboard carton, yes, sir.

Q. Was it behind it, was it in it?

A. The cartons were cardboard, they were—containing large bottles of liquid soap. The carton was cut on the top, the bottom was removed. I reached my hand into the carton and I came out with a loaded revolver.

Q. At the point that you obtained that weapon, and after the point that you had handcuffed the defendant, the only words I gather you said to him was where was the gun?

A. "Where is the gun?"

Q. Now, after you take the defendant—or—do you then after you have the gun question the defendant further?

A. All I said is that he was under arrest.

Q. So that's the time you use the words under arrest?

A. I says, "You're under arrest."

Q. And, is it at that point that you pull out that little slip of paper?

A. Approximately right at that time, yes, sir.

Q. And, is it that little slip of paper that you read before, was the same slip you read from then?

A. Yes, that's the one.

Q. Would you put your glasses on then, Officer?

The Court: He asked you did you put them on?

The Witness: Oh, did I put them on—no, sir.

Mr. Hyman: No further questions, your Honor.

The Court: Thank you, Officer. (Whereupon, the witness leaves the stand.)

Mr. Wallenstein: The People's case.

Mr. Hyman: Defendant's case, your Honor.

The Court: Defendant rests?

Mr. Hyman: Yes.

The Court: People rest?

Mr. Wallenstein: Yes.

The Court: Yes, counselor?

Mr. Hyman: Your Honor, I'm actually going to ask the court for a little time to submit a memorandum.

The Court: I'll reserve my decision, counselor.

Mr. Hyman: The reason being, your Honor, I think that we are at—I believe in view of the statement as to how this arrest, and the request for the gun came about that it violated the defendant's rights with re-

spect to Miranda, that he was not advised of his rights at the appropriate time and that the inculpatory statement of the gun is there—is, of course, the most critical.

So, if the statement falls, then so does the gun, and therefor—

The Court: (Int'g) How much time do you need, couselor?

Mr. Hyman: Your Honor, I would ask for a week, if that will be convenient to the court.

The Court: Well, minutes ordered. How much time do you want to submit the memorandum?

Mr. Hyman: Two weeks, your Honor. Give me a week after that, your Honor.

Mr. Wallenstein: Judge, I may or may not want to put in a memorandum depending on what Mr. Hyman has to say.

The Court: I want the memorandum within the three weeks, counselor.

Mr. Hyman: Fine, your Honor.

The Court: Then, I'll put the matter over for decision until April 9, counselor. I expect to have your memorandum in much before that.

Mr. Hyman: I will, your Honor.

The Court: Defendant is on bail. You have the memorandum to me within a week.

Mr. Hyman: I'll order the minutes.

The Court: Then, I should have your memorandum by the 23rd, the week of the 23rd.

Mr. Hyman: That is correct, your Honor. No later than let us say—as long as I have the minutes by March 20th, your Honor, you'll have my memorandum.

The Court: I want it no later than the 25th. You'll have it before the 20th, the minutes. The matter is adjourned to April 9; is that satisfactory?

Mr. Hyman: Yes, it is, your Honor.

Hearing on Motion to Suppress

The Court: Bail continued. Counselor, I've given you the opportunity to submit the memorandum and so forth, but for the record, you should make a motion.

Mr. Hyman: Okay. At this time, your Honor, under the evidence given, I believe that the defendant's constitutional rights were violated and that the weapon produced—introduced into evidence and the statements elicited by the officers are deprivations of his rights and should be suppressed.

The Court: Fine. Decision reserved.

(Whereupon, the case is adjourned to Thursday, April 9, 1981 at 9:30 a.m.)

* * *

This is to certify that the foregoing is a true and accurate transcription of the original stenographic record.

/s/ GLORIA SEELEY

Official Court Reporter

Order and Memorandum Decision of Hon. Nicholas Ferraro Granting Suppression

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM, PART 9 QUEENS COUNTY

88-11 Sutphin Boulevard, Jamaica, New York

Present:

HON. NICHOLAS FERRARO, J.S.C.
Justice.

Ind. No. 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENJAMIN QUARLES,

Defendant.

Motion

SUPPRESS STATEMENTS AND PHYSICAL EVIDENCE

Hearing March 6, 1981

The following papers numbered 1 to 3 submitted in this motion.

HYMAN & MINER, ESQS.
For the Motion

JOHN WALLENSTEIN, A.D.A.
Opposed

Order and Memorandum Decision of
Hon. Nicholas Ferraro Granting Suppression

	Papers Numbered
Notice of Motion and Affidavits	
Answering and Reply Affidavits	1–2
Exhibits	
Minutes of hearing	3

Upon the foregoing papers, THIS MOTION IS GRANTED. SEE MEMORANDUM ON FILE.

GRANTED:
Date: April 2, 1981
John J. Durante

/s/ N. F.

J.S.C.
HON. NICHOLAS FERRARO

Order and Memorandum Decision of Hon. Nicholas Ferraro Granting Suppression

MEMORANDUM

SUPREME COURT QUEENS COUNTY

CRIMINAL TERM, Part 9

BY NICHOLAS FERRARO, J.S.C.

Dated April 3, 1981

Indictment No. 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

BENJAMIN QUARLES,

Defendant.

The defendant, Benjamin Quarles, moves for an order; (1) to suppress certain statements allegedly made by him in violation of his constitutional rights pursuant to CPL section 710.20 (3); (2) to suppress certain physical evidence allegedly seized from him as a result of an unconstitutional search and seizure pursuant to CPL section 710.20(1).

A combination physical evidence suppression (*Mapp*) and *Huntley* hearing was held on March 6, 1981 and the court found the following:

On September 11, 1980 at approximately 12:30 A.M. Police Officer Frank Kraft was the operator of a marked

police car. He and his partner, Officer Sal Scarring, were eastbound on 47th Avenue at Francis Lewis Boulevard when a young woman ran over to the car and asked for assistance. She stated that she had been raped and that the man that did it was a male black, approximately six feet tall wearing a short black jacket with "Big Ben" in yellow letters on the back had gone into an A & P store on Francis Lewis Boulevard. She also stated the man had a gun. The woman was put in the police car and driven near the A & P. Officer Scarring called for back up units as Officer Kraft stood in the doorway of the store and saw the defendant walk toward a check out counter and place groceries on it. The defendant then turned and ran up the aisle toward the back of the store with Officer Kraft in pursuit. Officer Kraft lost sight of the defendant as the defendant turned at the end of the aisle but saw him seconds later two aisles away and told him to stop and put his hands over his head. At that time other police officers surrounded the defendant and Officer Kraft went over to the defendant and frisked him and discovered an empty shoulder holster. Kraft then handcuffed the defendant's hands behind his back. Kraft then asked the defendant where the gun was. The defendant looked in the direction of a stack of cartons and said "the gun is over there". The gun was not in sight but Kraft reached into a liquid soap carton and found a loaded revolver. He placed the defendant under arrest and read the proper *Miranda* warnings to him. He then asked the defendant if he owned the gun, the defendant replied "yes" and to the further question of where the gun was bought the defendant responded "Miami, Florida".

Order and Memorandum Decision of
Hon. Nicholas Ferraro Granting Suppression

The Court after a complete review of the credible evidence finds that the gun and the statement "the gun is over there" must be suppressed.

At the time the defendant was apprehended at least four officers were around the defendant with drawn guns. After the defendant was searched the police handcuffed his hands behind his back. There can be no doubt the defendant was in custody or arrested within the meaning of *Miranda* vs. *Arizona*, (86 S.Ct. 1602).

As stated in People v. Shivers, (21 NY2d 118)

> "However, once the officer draws his gun, the individual interrogated is actually deprived of his freedon and under *Miranda*, he may no longer be questioned without first being warned of his rights, and any statement elicited without such warnings may not be received in evidence, or otherwise used, at a subsequent trial".

Later cases have held a police officer may ask questions under the Stop and Frisk rule where justified by reasonable suspicion or to protect the officers safety (People v. Chestnut 51 NY2d 14; People v. Hoffman, 41 NY2d 29). Here the police by handcuffing the defendant had in affect arrested the defendant. He was now entitled to the *Miranda* warnings before any questioning as the police had reasonable cause to arrest and the officers safety was not in question.

The further question of whether to suppress the additional statements by the defendant that he owned the gun and bought it in Miami, Florida after the Miranda warnings were given is a much closer question of law.

The Court finds that the statements made by the defendant after he was given the *Miranda* warnings was tainted

by the previous seizure of the weapon and the statement without the warnings. Once the defendant made a prior statement improperly elicited this let "the cat out of the bag" and affected his subsequent statement (United States ex rel Stephen J.B. v. Shelly 430 F2d 215, 219). The later statements were made within a period of minutes after the finding of the gun while still in the store and can be called the fruit of the poisonous tree.

Based on the foregoing and the totality of circumstances the court will suppress the statements that the defendant owned the gun and brought it in Miami, Florida.

Order entered accordingly.

The Clerk of court is directed to mail a copy of this decision and the order to be entered thereon to the attorney for the defendant and the District Attorney.

/s/ N. F.

Nicholas Ferraro, J.S.C.

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM : COUNTY OF QUEENS

Indictment No. 2512-80

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

BENJAMIN QUARLES,

Defendant-Respondent.

NOTICE OF APPEAL

SIR:

PLEASE TAKE NOTICE that the People of the State of New York hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, pursuant to § 450.20, subd. 8, of the Criminal Procedure Law from that part of an order entered April 3, 1981, suppressing, after a hearing, the use of physical

evidence and statements, and from each and every part of said order as well as from the whole thereof.

Dated: Kew Gardens, New York
April 29, 1981

Yours, etc.

JOHN J. SANTUCCI
District Attorney
Queens County
125-01 Queens Boulevard
Kew Gardens, N.Y. 11415
(212) 520-2092

To:

Hon. JOHN J. DURANTE
County Clerk, Supreme Court
88-11 Sutphin Boulevard
Jamaica, New York 11435

HYMAN & MINER, Esqs.
Attorneys for Defendant-Respondent
148 East 78th Street
New York, New York 10021

Statement

SUPREME COURT OF THE STATE OF NEW YORK

CRIMINAL TERM : COUNTY OF QUEENS

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

BENJAMIN QUARLES,

Defendant-Respondent.

STATEMENT

1. The undersigned, on behalf of the People of the State of New York, has taken an appeal from that part of an order of the Criminal Term of the Supreme Court, Queens County, entered April 3, 1981, suppressing, after a hearing, the use of physical evidence and statements.

2. In the undersigned's opinion the deprivation of the use of evidence suppressed has rendered the sum of the proof available to the People with respect to the indictment herein insufficient as a matter of law.

JOHN J. SANTUCCI
District Attorney
Queens County

By WILLIAM SCHRAGER

Dated: Kew Gardens, N.Y.
April 29, 1981

Order of Appellate Division Affirming Order Appealed From

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on December 7, 1981

HON. VINCENT D. DAMIANI, *Justice Presiding,*
HON. VITO J. TITONE,
HON. GUY J. MANGANO,
HON. DAVID T. GIBBONS,
Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

v.

BENJAMIN QUARLES,
Respondent.

ORDER ON APPEAL FROM ORDER

IT the above entitled cause, the above named The People of the State of New York, plaintiff, having appealed to this court from an order of the Supreme Court, Queens County, dated April 3, 1981; and the said appeal having been argued by Steven J. Rappaport, Esq., of counsel for the appellant, and argued by Steven J. Hyman, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon the court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Statement of No Opinion By the Appellate Division

VINCENT D. DAMIANI, J.P.
VITO J. TITONE
GUY J. MANGANO
DAVID T. GIBBONS, JJ.

—— AD2d —— A—November 9, 1981

2205 E

(Ind. No. 2512-80)

THE PEOPLE, etc.,

Appellant,

v.

BENJAMIN QUARLES,

Respondent.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (Steven J. Rappaport of counsel), for appellant.

Hyman & Miner, New York, N.Y. (Steven J. Hyman of counsel; Wayne Brody on the brief), for respondent.

Order of the Supreme Court, Queens County (FERRARO, J.), dated April 3, 1981, affirmed. No opinion.

DAMIANI, J.P., TITONE, MANGANO and GIBBONS, JJ., concur.

Order Granting Leave to Appeal to the Court of Appeals of the State of New York

STATE OF NEW YORK COURT OF APPEALS

BEFORE:

HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

BENJAMIN QUARLES,

ORDER GRANTING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at Albany, New York
February 11, 1982

SOL WACHTLER

Associate Judge

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* Description of Order: Order of Supreme Court, Criminal Term, Queens, April 3, 1981, suppressing statements and physical evidence; affirmed by Appellate Division, Second Department, December 7, 1981.

Memorandum Opinion of the Court of Appeals, State of New York

COURT OF APPEALS—STATE OF NEW YORK

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

2 No. 615

THE PEOPLE &c.,

Appellant,

v.

BENJAMIN QUARLES,

Respondent.

(615) John J. Santucci, DA, Queens County (Steven J. Rappaport of counsel) for appellant.

Steven J. Hyman & Wayne Brody, NY City, for respondent.

MEMORANDUM.

The order of the Appellate Division should be affirmed.

It was only after defendant had been frisked and his hands handcuffed behind his back that, in consequence of the discovery of an empty shoulder holster, Officer Kraft asked him where the gun was. Pointing to a liquid soap carton several feet away, defendant replied, "The gun is over there." At the time defendant was surrounded by four police offiicers whose guns had been returned to their hol-

sters because, as Officer Kraft testified, "the situation was under control". Nothing suggests that any of the officers was by that time concerned for his own physical safety.

Inasmuch as defendant's response to the police interrogation occurred while he was in custody, before he had been given the pre-interrogation warnings to which he was constitutionally entitled, the courts below properly suppressed defendant's statement and the gun which officer Kraft had found on reaching into the liquid soap carton to which defendant had pointed. Similarly, the statements made by defendant only minutes later after he had been given his pre-interrogation warnings were properly suppressed as having been tained by the seizure of the gun and defendant's pre-warning statement as to its location.

Even if it be assumed that an emergency exception to the normal rule might be recognized if the purpose of the police inquiry had been to locate and to confiscate the gun for the protection of the public as distinguished from their desire to obtain evidence of criminal activity on the part of defendant—a proposition as to which it is not nescessary in this case to express an opinion—there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern. Nor, so far as appears from the record, was any such theory advanced by the People at the suppression hearing. Undeniably neither of the courts below, with fact-finding jurisdiction, made any factual determination that the police acted in the interest of public safety.

The two cases on which the dissent would rely are inapposite. In *People v Huffman* (41 NY2d 29) the question was put to the defendant while the police were engaged in a general investigation of possible criminal activity but before they were aware that any crime had been committed and was framed as a threshold inquiry seeking general information only ("What are you doing back here?") rather than calculated to elicit evidence of criminal activity ("Where is the gun?"). In *People v Chestnut* (51 NY2d 14, cert den 449 US 1018) where the defendant's challenge was based primarily on his constitutional right to be free from unreasonable search and seizure under the Fourth Amendment of the Federal Constitution rather than his constitutional right to pre-interrogation warnings, although the defendant and his companion were lying prone on the ground and the officers were standing over them with their guns drawn, the defendant had not been reduced to a condition of physical powerlessness as here, i.e., the situation was not yet "under control", and the police question was found to have been prompted by the officers' concern for their personal safety. We noted that the absence of any constitutionally mandated pre-interrogation warnings did not call for suppression inasmuch as there was no custodial interrogation.

Memorandum Opinion of the Court of Appeals

WACHTLER, J. (dissenting):

In my view, under the circumstances, the police responded to an emergency situation in an entirely reasonable manner and, therefore, suppression of the weapon and defendant's statements cannot be justified on the ground that he was subjected to "custodial interrogation" in violation of his *Miranda* rights.

On September 11, 1980 at approximately 12:30 a.m. Officer Frank Kraft and his partner, Officer Sal Scarring, were on road patrol on 47th Avenue at Francis Lewis Boulevard, Queens, when a young woman approached and requested assistance. She stated that she had just been raped by a man she described as a black male, approximately six feet tall wearing a black jacket with the name "Big Ben" in yellow letters on the back. She indicated that her assailant had entered the nearby A&P supermarket on Francis Lewis Boulevard, and that he had a gun.

The officers drove the woman to the supermarket where Kraft approached the front of the store on foot while Scarring radioed for assistance. Kraft then observed the defendant, who matched the description given by the woman, approaching the checkout counter. Defendant then fled to the rear of the store with Kraft, who lost sight of the defendant for several seconds, in pursuit. Kraft told defendant to stop and put his hands over his head. Other officers who had arrived in the interim surrounded defendant while Kraft frisked him, discovering an empty shoulder holster.

Kraft handcuffed defendant's hands behind his back and asked him where the gun was. The defendant looked in the

direction of a stack of cartons and responded "the gun is over there". The gun was not visible but Kraft reached into one of the cartons and retrieved a loaded revolver. He placed defendant under arrest and advised him of his *Miranda* rights. Kraft then asked defendant if he owned the revolver and received an affirmative reply. In response to another question posed by Kraft defendant indicated that he purchased the weapon in Miami, Florida.

Criminal Term suppressed the statement "the gun is over there" because defendant had not yet been informed of his *Miranda* rights, and also suppressed the revolver and post-arrest statements as tainted evidence (*Wong Sun v United States*, 371 US 471). The Appellate Division affirmed without opinion. In my view neither the letter nor the spirit of the Supreme Court's decision in *Miranda v Arizona* (384 US 436) was violated under these circumstances, and, accordingly, I dissent and vote to reverse.

In *Miranda v Arizona* (384 US 471, *supra*) the Supreme Court held that statements obtained as the result of a custodial interrogation of a defendant may not be used at trial absent some demonstation that procedural safeguards were employed to secure the defendant's privilege against self-incrimination. The court recently interpreted the meaning of the term "interrogation", as used in this context, as including not only express questioning but also its functional equivalent, defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (*Rhode Island v Innis*, 446 US 291, 301).

Careful analysis of the *Miranda* and *Innis* decisions suggests that the court is primarily concerned with discouraging official conduct which, examined objectively, reveals an unmistakably deliberate attempt to elicit some incriminating response from the detainee as opposed to official conduct designed to achieve an articulable and legitimate noninvestigatory purpose. Neither the Supreme Court nor this Court has ever ruled that a response to a question properly classifiable in the latter category should be suppressed as the product of a custodial "interrogation" in violation of *Miranda's* admonition.

In *People v Huffman* (41 NY2d 29) we held, after determining that defendant was clearly in custody, that the question "what are you doing back there?" directed at a suspect discovered hiding in some shrubbery behind a store at 4 a.m. did not constitute "interrogation" within the meaning of *Miranda*. We determined that the question "was designed to clarify the nature of the situation confronted, rather than to coerce a statement . . . [the officers] had found themselves, quite inadvertently, in the middle of a possible criminal transaction and immediate clarification was necessary before taking drastic action" (41 NY2d, *supra* at p. 34).

In *People v Chestnut* (51 NY2d 14) we addressed a factual situation remarkably similar to the instant case. An officer in pursuit of two robbery suspects, at least one of whom was believed armed, observed one pass a small object to the other. After the suspects were apprehended and, while they were lying on the ground with the officer's revolver trained on them, the recipient of the object was asked

"where is the gun?" Citing *Huffman*, we specifically held that none of defendant's Fifth Amendment rights were violated notwithstanding that no *Miranda* warnings were given before the question was posed. We expressed our "opinion that this single question did not constitute custodial interrogation and, thus, the response given by defendant—'It's right here'—need not be suppressed even though defendant was not informed of his constitutional rights before answering" (51 NY2d, supra, at p 23 n 8 [citation omitted]). Since there could be no doubt, after *Huffman*, that defendant was in custody (although not under arrest) the clear import of our holding was that the question was not, under the circumstances, the equivalent of "interrogation" within the meaning of *Miranda*.

Although the officer in *Chestnut* indicated that he believed himself to be in physical danger when he asked the suspect for the weapon, the factual finding by the courts below in this case that the officer's safety was never in question does not require a contrary result. Initially, it is worth noting that nothing in our opinion in *Chestnut* either explicitly or implicitly suggested that our determination that the question was not prescribed [sic] by *Miranda* (as opposed to our holding that the question was not an improper stop and frisk under the Fourth Amendment) was based on the officer's perceived threat of physical danger.

More significantly, the danger posed to the general public in this case due to the officers' inability to locate a loaded weapon—a threat which many would perceive to be even more insidious than the threat to the officer's life in *Chestnut*—certainly provides a sufficiently compelling non-investigatory purpose for questioning defendant about the

gun's location without first warning defendant of his *Miranda* rights.[1] Approaching the situation with foresight, as Officer Kraft would have, it is evident that the loaded weapon here could have been passed to a cohort, an accomplice bent on securing the freedom of his captured ally, or, worse yet, dropped on the street outside the supermarket to become the weapon of an innocent child, a mentally unstable adult, or anyone else who might decide to use it. Faced with an obvious emergency requiring an immediate response, Officer Kraft, like the officers in *Huffman*, acted reasonably and, in my view, properly in questioning defendant in a limited manner "designed to clarify the nature of the situation confronted" (41 NY2d *supra, at* p 34).[2]

To require a police officer to provide *Miranda* warnings before asking about the location of a weapon under the circumstances of this case would only unnecessarily enhance the potential for death or severe injury. Far from reveal-

1. In an analogous factual context, the Fifth Circuit Court of Appeals, sitting *en banc*, expressed a similar view: "We find ourselves unable to condemn, after the fact and on grounds of some delicacy, such mild prophylactic measures reasonably calculated to ensure the safety of the officers, the suspect, and others on the scene as well. Te be sure, the court below concluded that the agents did not feel physically threatened by Castellana, but in our view the mild measures adopted were justified by a reasonable prudence under the circumstances and did not require an actual fear of imminent harm to validate them" (*United States v Castellana*, 500 F2d 325, 326-327 [footnote omitted]).

2. Nor do we place any significance, as does the majority, in the fact that the police officer's question was not found by the suppression court to have been prompted by the officer's concern for his personal safety or the safety of others. Indeed this is not an appropriate standard to measure the reasonableness of a police officer's conduct in a situation such as this which was fraught with danger. This was our holding in *People v Moore*, (32 NY2d 67): "Then, too, we attach no significance to the fact that at the suppression hearing the arresting officer did not articulate any feeling of fear for his own safety or for the safety of others at the time of the search".

ing a deliberate design on the part of the officer to elicit an incriminating statement from defendant, the record before us portrays a prudent measure undertaken to neutralize the very real threat of possible physical harm which could result from a weapon being at large.[3] Nothing could be more appropriate here than our observant understatement in *Huffman* (41 NY2d, supra, at p 34) that "[t]his was no time for pre-interrogation warnings, or the tender of legal representation".

Miranda was never intended to enable a criminal defendant to thwart official attempts to protect the general public against an imminent, immediate and grave risk of serious physical harm reasonably perceived. Any result which discourages the police from pursuing this type of precautionary measure by requiring *Miranda* warnings beforehand, at the risk of losing the use of all evidence derived thereafter, is contrary to reason and binding precedent.

Accordingly, I respectfully dissent and vote to reverse.

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Order affirmed in a memorandum in which Chief Judge Cooke and Judges Jones, Fuchsberg and Meyer concur. Judge Wachtler dissents and votes to reverse in an opinion in which Judges Jasen and Gabrielli concur.

Decided November 18, 1982

3. In view of the validity of the first question asked of defendant regarding the location of the gun and the admissibility of his answer, there is no longer a predicate to suppress the revolver. Seizure of the weapon violated no Fourth Amendment right of the accused. Likewise, all of defendant's post-arrest statements are properly admissible, for the questions which elicited those responses were prefaced by the administration of proper *Miranda* warnings.